FILE COPY

FILED
OCT 4 19

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 571 ~~572~~

SCHINE CHAIN THEATRES, INC., *et al.*,
*Appellants,*

v.

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF IN OPPOSITION TO MOTION BY APPELLEE TO DISMISS OR AFFIRM

WILLARD S. McKAY
*Attorney for Appellants*

ARTHUR GARFIELD HAYS,
SEYMOUR M. HEILBRON,
*Of Counsel*

BLEED THROUGH – POOR COPY

## TABLE OF CONTENTS


PAGE

Point I—The judgment appealed from is a final judgment ..... 3

Point II—Section II of the judgment cannot be separately affirmed ..... 7

Point III—The appellee's request for a postponement of the argument of this appeal is improper on this motion ..... 8


## TABLE OF CASES CITED


*Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362.... 5

*Forgay* v. *Conrad*, 6 How. (U. S.) 201..... 5

*Green* v. *Fisk*, 103 U. S. 518 ..... 4

*Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386..... 4

*Keystone Iron Co.* v. *Martin*, 132 U. S. 91..... 4, 5

*Knox Loan Assn.* v. *Phillips*, 300 U. S. 194..... 5

*Korematsu* v. *United States*, 319 U. S. 432..... 5

*Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120.. 5

*U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173....3, 6, 7

*United States* v. *Pullman Co.*, 53 F. Supp. 908..... 5

BLEED THROUGH - POOR COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

SCHINE CHAIN THEATRES, INC., *et al.*,
*Appellants,*

v.

UNITED STATES OF AMERICA,
*Appellee.*

No. ——

## BRIEF IN OPPOSITION TO MOTION BY APPELLEE TO DISMISS OR AFFIRM

The appellee, the plaintiff in the District Court, has filed in the District Court a statement opposing the jurisdiction of the Supreme Court and has combined with that statement a motion to dismiss or affirm. (Although the statement filed contains no motion in terms, the motion can probably be spelled out from the use of the word "motion" in the caption and the last paragraph of that portion of the statement which is designated "argument".)

The relief sought by the appellee is either

1. That the appeal be dismissed as pre-mature; or
2. That the appeal be dismissed as to Section III of the judgment and the judgment affirmed as to Section II thereof; or
3. That the hearing of the argument upon our appeal be postponed until an appeal or appeals from a further judgment which the appellee expects the District Court to enter.

The contention advanced by the appellee that this case involves an appeal from only Sections II and III of the amended judgment is obviously erroneous. The appeal is taken from the entire judgment, particularly including Section I which constitutes the very foundation upon which the entire judgment must stand or fall. Without the holding under Section I that the appellants have conspired and combined to violate and have violated the Sherman Act there would be no basis whatsoever for the remaining provisions of the judgment. The second to thirty-sixth assignments of error are addressed solely and directly to Section I of the judgment.

It is accordingly difficult to understand appellee's attempt to deal piece-meal with Sections II and III of the judgment. Were this court to grant the second alternative prayer, and subsequently decide in favor of the appellants on their appeal as to Sections I and IV, it would leave Sections II and III of the judgment hanging in the air, unsupported by any holding that the Sherman Act had been violated and therefore wholly without any force or effect.

The historical account in appellee's statement regarding proceedings after the original judgment is not a part of the record before this court at this time. The fact that the original judgment contained a provision for the filing of plans and objections thereto is wholly meaningless in view of the fact that when the amended judgment from which this appeal is taken was entered, all references to the submission of plans was eliminated upon the initiative of the appellee. If this amended judgment is not a final judgment from which an appeal may be taken to the Supreme Court the plaintiff in the District Court could continue indefinitely the injunctive provisions of Section II of the judg-

BLEED THROUGH – POOR COPY

ment simply by taking no steps to procure the approval of a plan such as appellee claims to be necessary to render Section III of the judgment appealable.

Similarly, the Consent Order referred to under the caption "Argument" is no part of the record before this court on this motion and in fact any reference thereto, either now or at any time during the pendency of this appeal, for the purpose of prejudicing in any way the appeal, is highly improper. The order was a temporary expedient resorted to to avoid trying the case shortly after the start of World War II and by its terms was not to be used against the consenting defendants for any purpose whatsoever other than as expressly provided in the order. This order expired by limitation of time on November 15, 1944 and has been of no force or effect since then.

The appellant maintains that the judgment appealed from is a final judgment and that the appeal presents for review substantial questions, consideration of which is not foreclosed by the recent decision in *U. S.* v. *Crescent Amusements,* 323 U. S. 173.

## POINT I.

### The judgment appealed from is a final judgment.

The judgment appealed from consists of four parts. The first part decrees that defendants have violated the Anti-Trust Laws. The second portion grants sweeping injunctive relief. No one could deny the finality of the judgment had it stopped there. Certainly there is nothing in the third section of the judgment which justifies any contention that the judgment was not final. It is interesting to observe that appellee says of this section of the

judgment that it is "in a form so abstract that it requires no action or inaction of any kind on the part of any defendant". If that be indeed a true description of this portion of the judgment, which was signed by the District Judge in the very words drafted by appellee, then it was improper to include any such provision in the judgment. It is the function of an equity decree to advise defendant what he must do, since he could be punished for contempt of court for failure to comply. A provision which is vague is improper and will be stricken out on appeal.

> "The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt' * * *" *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, at 410 (also cases there cited in foot notes 7 and 8.)

Appellee argues, altho examination of the judgment itself shows just the contrary, that this judgment is on its face merely preparatory to the entry of a further order granting relief in concrete terms and contends that such an order is not appealable until the further order has been entered, citing *Green* v. *Fisk*, 103 U. S. 518 and *Keystone Iron Co.* v. *Martin*, 132 U. S. 91.

Neither of these cases has any bearing upon the situation here. The *Green* case was a partition action where the Court below had adjudged each of the appellees to be the owner of one-eighth of the property and had referred the matter to a master to proceed to a partition. Obviously this was not a final decree, but the actual ground of dismissal was the fact, as stated in the opinion, that even if it had been a final decree, the court "would be without jurisdiction because the property only has been adjudged to the appellees, and the value of that is less than the amount required to bring a case here."

BLEED THROUGH – POOR COPY

The nature of the *Keystone* case is best indicated by the head note to the case in Book 33 of the Lawyers' Edition, reading as follows:

> "The decree is not final and is not appealable where the action is for an injunction restraining defendant from committing further trespasses on the mineral and ore in land or removing the same and for an account of the quantity and value of the ore taken from the land by the defendant, and the decree grants the injunction, and orders an accounting, *but the account remains to be taken.*" (Italics ours)

More to the point is the recent decision of this Court in *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, where the Court following the cases of *Forgay* v. *Conrad,* 6 How. (U. S.) 201 and *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, held that where the decree appealed from directed the immediate delivery of physical property it is reviewable by the Supreme Court even though the same judgment also ordered an accounting. (See also *Knox Loan Assn.* v. *Phillips,* 300 U. S. 194, 197 and *Korematsu* v. *United States,* 319 U. S. 432, 435.)

In the instant case the judgment appealed from on its face calls for no further present judicial action, not even an accounting such as was ordered in the cases just cited. The judgment (a) decreed that the defendants had violated the Sherman Act (Section I of the Judgment) and (b) provided remedies against future violations (Sections II and III of the Judgment). Later judicial action would be appropriate only if the government were to contend that the defendants were not complying with the judgment (*United States* v. *Pullman Co.,* 53 F. Supp. 908) and in

such event the action would be taken, not under Section III but under Section IV. Moreover, such further judicial action would have to be based upon a new record starting with an application by the government containing appropriate allegations of fact. These appellants would thereupon have an opportunity to controvert such allegations. Presumably a hearing would be held at which testimony would be taken, as in any other case where it is claimed that a defendant has failed to obey the direction of an equity judgment. The issues raised on the appeal which might be taken from the direction then made by the court would be entirely different from the issues to be raised on the pending appeal.

The pending appeal raises two basic issues: (1) Was the court correct in determining that defendants had violated the Sherman Act, and (2) if the first point be resolved against the appellants, is the relief granted proper? The mere statement by the government that it knows of no case in which a Sherman Act defendant has sought to appeal from a "judgment of divestiture" pending adoption of a plan to put it into effect has no weight here. In the first place it is improper to characterize the judgment here as a "judgment of divestiture". The appellee has consistently contended that this case is on all fours with *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, and yet no question was ever raised in that case, but that the judgment of the District Court was a final and appealable judgment without awaiting any further action on the part of the District Court looking toward the formulation of a plan. Obviously in cases where the original judgment in terms provides for the submission and approval of a plan or plans, there may be some logic in arguing that the appeal should

BLEED THROUGH – POOR COPY

await the adoption by the District Court of a plan. It was for this reason, among others, that the appellants made no effort to procure the allowance of the appeal which they filed on December 28, 1945, pending the determination of their motion to amend the findings. However, after determination of that motion the Court signed a judgment which had been physically prepared by the appellee which judgment eliminated, at the instance of appellee, any provision for the submission or approval of a plan. It can not now be argued that this judgment is not final and appealable because a former order in the case contained reference to the preparation of a plan.

## POINT II.

**Section II of the judgment cannot be separately affirmed.**

The suggestion by the appellee that Section II of the judgment should be dealt with separately from the remainder of the judgment and, as such, affirmed is, while entirely novel, wholly without merit. Section II relates only to the injunctions to which the appellants are to be subjected if the Court below is sustained in its holdings resulting in Section I. No part of the judgment can be sustained unless this court holds that the court below was correct in finding that the appellants have violated the Sherman Act. This can not be determined from an inspection of the opinion and findings of Judge Knight all of which are challenged by this appeal on the ground that they are not supported by the evidence. Nor can it be determined by comparison of these findings, with the findings in the *Crescent* case which are not before the court at this

time. A determination of the merits of this appeal can be arrived at only after a careful examination of the entire record in this case, and full opportunity for argument.

**POINT III.**

**The appellee's request for a postponement of the argument of this appeal is improper on this motion.**

It is a sufficient answer to the third alternative suggested by the appellee that there is no provision either under paragraphs 3 or 4 of Rule 7 or paragraph 3 of Rule 12 for the entertainment by the Court on this motion of an application for a postponement of the argument of the appeal. The Court should therefore decline to consider this request by the appellee at this time.

**Appellee's motion should be in all respects denied.**

Respectfully submitted

WILLARD S. MCKAY,
*Attorney for Appellants.*

ARTHUR GARFIELD HAYS,
SEYMOUR M. HEILBRON,
*of Counsel.*

BLEED THROUGH – POOR COPY